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IN THE

Supreme Court of the United States

October Term, 1945

No. 935

UNITED STATES OF AMERICA,

Petitioner,

against

PETTERSON LIGHTERAGE & TOWING CORPORATION, and CONNERS MARINE CO., INC., as Owner of the scow *EVERETT FOWLER*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETTERSON LIGHTERAGE & TOWING CORPORATION IN OPPOSITION.

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 915

UNITED STATES OF AMERICA,

Petitioner,

against

PETTERSON LIGHTERAGE & TOWING CORPORATION, and CONNERS MARINE CO. INC., as Owner of the scow *Everett Fowler*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETTERSON LIGHTERAGE & TOWING CORPORATION IN OPPOSITION.

1. The decision of the court below rests upon factual findings that the United States was guilty of a breach of its contractual obligation to this respondent. (R. 119). Those findings appear in the following portions of its opinion:

> "The United States, the consignee, was negligent here in failing to provide a safe berth after receiving notice of the storm and of the resultant danger to the barge * * *. There was no jurisdiction, under the Public Vessels Act, 46 U. S. C. A. 781, to entertain the charterer's petition against the United States, * * * But the Court had jurisdiction of that petition under the Tucker Act, 28 U. S. C. A. §41 (20); for

> an action under that statute may be maintained for the breach by the United States, as consignee, of its contractual obligation to the charterer. It is of no moment that the petition stated that it was 'filed under' the Public Vessels Act. As the petition showed a cause of action, the label should be disregarded." (R. 119).

The findings of the District Court, amplified by its opinion, (R. 103-109), support the findings of the Circuit of Appeals with respect to the petitioner's breach of its contractual obligation. The Circuit Court of Appeals was thereupon justified in disposing of the litigation, without requiring the formality, expense, and delay of a new complaint "labelled" under the Tucker Act, which would merely have led to the same result.

The petitioner confuses the case by discussing it upon matters of form arising from the circumstances that the proceedings were initiated in admiralty in the District Court, where this respondent's petition against the United States was filed under the Public Vessels Act. But, in view of the conclusion of the Circuit Court of Appeals that this respondent's petition had been "labelled" wrongly on the admiralty side of the Court, and that the case should be decided as though this respondent had asserted its cause of action against the United States under the Tucker Act, the main question now raised, is whether the Circuit Court of Appeals erred in finding a breach of petitioner's contractual obligation to this respondent, which would seem to be solely a question of fact.

2. The petitioner entered into a contract with this respondent for the lighterage of petitioner's merchandise in New York Harbor, between berths to be designated by the petitioner, (R. 36-37). Under that contract, the rela-

tionship between the parties was substantially the same as the relationship between an owner of an ocean-going freighter and an owner of cargo, under a voyage charter. It is sound law that when the cargo owner reserves the right to designate and furnish the berths in which the vessel shall load and discharge, it is a term of the contract (implied if not expressed,) that the berths so designated and furnished by the cargo owner will be safe. In the formal printed charter parties or bills of lading of ocean-going carriers that term is usually expressed. *Mencke* v. *Cargo of Sugar*, 187 U. S. 248, 253; *The Antonio Zambrana*, 70 Fed. 320, 323.

Such a contractual obligation of the cargo owner to furnish a safe berth should not be confused with the legal duty of the owner of a wharf to warn an invitee of any hidden danger. The cases cited on pages 11-12 of the petition relating to a wharfinger's duty have no direct bearing upon the cargo owner's contractual obligation under the contract of carriage.

When this respondent furnished the scow *Everett Fowler* to carry a cargo of drums of gasoline (R. 38) under its contract, it stood in the relationship of owner of the scow, so far as the petitioner was concerned, even though the scow had been chartered by this respondent from Conners Marine Co. Inc. (R. 36).

This respondent caused the *Everett Fowler*, with the cargo of gasoline aboard, to be towed to the petitioner's Army Base, Brooklyn, where, on arrival, petitioner's servants and representatives directed that the scow be moored with other boats at the petitioner's stakeboat. (R. 57-58). Admittedly, the stakeboat was owned, operated, and maintained by the petitioner for its own convenience,

anchored some distance off the Army Base piers as a temporary berth for loaded boats until the petitioner was ready to discharge their cargoes, (R. 27). The petitioner also maintained at the Army Base a fleet of its own tugs by which the lighters were moved from the stakeboat to a discharging berth at the Army Base at the petitioner's convenience (R. 40-41; 75).

On the day after arrival at the petitioner's stakeboat the captain of the *Everett Fowler* telephoned to this respondent to report that, in the existing stormy weather, the berth at the stakeboat was unsafe. This respondent immediately telephoned that information to the office of petitioner's despatcher at the Army Base, and was told that the despatcher's office would "take care of it." (R. 42-43). Thereafter, the petitioner failed to remove the scow to a safe berth, and while continuing to lie in the unsafe berth at the stakeboat, she sustained the damages which are the subject matter of this litigation.

The foregoing facts are included in the opinion and findings of the District Court, (R. 103-109) and they support the finding of the Circuit Court of Appeals that the damages were the result of the petitioner's breach of its contractual obligation to this respondent, (R. 119).

3. Although there were two separate causes of action between the three parties to the original proceedings in admiralty, the identical proofs pertained to both actions with respect to the cause and extent of the damage to the scow. Conners Marine Co. Inc., as owner of the *Everett Fowler,* had a cause of action in contract against this respondent as charterer, because of the return of the scow in damaged condition. This respondent, under its contract of carriage, had a cause of action against the petitioner for the same damages to the *Everett Fowler,* resulting from

the petitioner's breach of its contractual obligation to furnish a safe berth.

Conners Marine Co. Inc., having elected to proceed in admiralty, this respondent followed the admiralty practice by asserting its cause of action against the petitioner in a petition of interpleader, thinking that that procedure could be sustained under the Public Vessels Act, 46 U. S. C. A. 781. The Circuit Court of Appeals, having found that jurisdiction could not be invoked under the Public Vessels Act, concluded that this respondent's pleading against the petitioner stated a cause of action under the Tucker Act, 28 U. S. C. § 41(20) on the factual basis that the damage complained of resulted from petitioner's breach of a contractual obligation. There was no inconsistency in the ruling that, as this respondent could not assert against the petitioner a statutory action in tort under the Public Vessels Act, respondent could still assert its cause of action *ex contractu*, under the Tucker Act. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 372.

The situation, then, was that this respondent could have brought a separate action against the petitioner under the Tucker Act which presumably could have been heard by the Court at the same time as the suit of Conners Marine Co. Inc. against this respondent, inasmuch as both causes of action arose out of the same incident, and the identical evidence was pertinent to each with respect to the cause and extent of the damage. Or, a severance of the two causes of action might have been ordered, leaving this respondent's cause of action under the Tucker Act to be heard separately, *Lynn* v. *United States*, 110 F. (2d) 586; *Lowe* v. *United States*, 37 F. Supp. 817. The Circuit Court of Appeals apparently took the view that any such further formalities would waste the time of the courts and of the

litigants, inasmuch as no different result would be reached through further proceedings. It therefore construed the case as though this respondent had sued the petitioner under the Tucker Act; and although the Circuit Court of Appeals followed the form of the admiralty procedure in adjudicating a primary and secondary liability, the result was exactly the same as though there had been two separate actions with an award of damage to Conners Marine Co. Inc., against this respondent, and a further award of the same identical damage to this respondent against the petitioner. In thus eliminating the formality of further proceedings, the Circuit Court of Appeals followed an established practice. *Admiral Oriental Line* v. *United States,* 86 F. (2d) 201, 203; *United States* v. *The John R. Williams,* 144 F. (2d) 451, 454; *Cory Bros.* v. *United States,* 51 F. (2d) 1010, 1013.

4. For the foregoing reasons, this respondent believes that this case does not involve the questions of law, or conflicts between the courts, asserted by the petitioner, and that the various decisions cited in the petition, such as *United States* v. *Sherwood,* 312 U. S. 584, have no application because of the factual background of the case at bar.

5. The petitioner's assertion that there are approximately 100 outstanding claims against the United States in the New York area which may be affected by the decision in this case does not lend importance to the present matter. The facts which may be involved in the said outstanding claims are not disclosed. If those facts may be such as to sustain actions against the United States under the Tucker Act, that circumstance furnishes no basis for requesting that this Court grant a writ of certiorari in the present case.

6. The case at bar, involving $3,700, and turning upon the factual findings of the Circuit Court of Appeals, is of no such importance as to justify the petitioner's prayer for a writ. *Layne* v. *Western Well Works,* 261 U. S. 387, 392, 393; *Magnum Co.* v. *Coty,* 262 U. S. 159, 163; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Furness* v. *Yang-Tsze Ins. Ass'n,* 242 U. S. 430; *Tyrrell* v. *District of Columbia,* 243 U. S. 1.

7. The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the decision below in this case should be denied.

Respectfully submitted,

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